(3)

No. 06-902

FILED
APR 26 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

MIGUEL FIGUEROA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF

HEATH W. HOGLUND
HOGLUND & PAMIAS, P.S.C.
256 Eleanor Roosevelt Street
San Juan, Puerto Rico 06918
(787) 772-9200

ROBERT H. RINES
Counsel of Record
RINES & RINES
24 Warren Street
Concord, NH 03301
(603) 228-0121

Counsel for Petitioner

208254

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Reply to Brief	1
Argument	2
Conclusion	7

TABLE OF CITED AUTHORITIES

Page

Cases:

FCC v Beach Commnc'ns, Inc., 508 U.S. 307 (1993) 1, 2

Lehnhausen Lake Shore Auto Parts Co., 410 U.S. 356 (1973) 1, 2

United States R.R. Ret. Bd. v. Fritz, 449 U.S. 166 (1980) 1, 2

United States Constitution:

Article I, Section 8 5

Article I, Section 9, clause 4 6

REPLY TO BRIEF

In its reply urging dismissal of the petition herein, the government re-asserts the position that petitioner has not overcome the "heavy burden" of showing that there is no "plausible reason" and thus "no rational basis on which Congress *could* conclude" that "legitimate congressional objectives" could be fulfilled.

In this case, those "objectives" are the mandate of the Patent Clause for "securing" inventors rights through supporting, in the solicitor's words, "the cost of running the patent system" (S.B.4)[1] to grant timely patents.

It is important to note that the solicitor has **not denied** petitioner's claim (Pet. 3) that the fund diversions complained of herein have been of such "substantial portions . . . that they seriously contributed to disabling the PTO from performing the constitutional Congressional mission of adequately 'securing' patents"— paraphrased by the solicitor as "underfunding . . . creating delays of ten years or more in the processing of patent applications" (S.B.9)[2].

As later more fully pointed out, this is a very different circumstance that distinguishes from the rationale of the *FCC, Lehnhausen,* and *United States R.R. Ret. Bd*

---

1. References to the government's brief are by the notation ("S.B.")

2. The solicitors' brief mentions that petitioner has already received his patent (S.B. 9) and that his invention does not embrace fast-growing technologies — but there is only one PTO that must serve all technologies, and the new "maintenance" collections in years 3 ½, 7 ½ and 11 ½ after patent grant, tax all inventors and patentees.

precedents[3], relied on by the solicitor and the court below for the doctrine of "plausible reasons" of justification. In none of these prior cases, however, did Congress's actions disable Congress from the ability to fulfill its constitutional functions, as here.

It is for this reason that petitioner has argued, in his petition, that by proving that Congress' action **has disabled** it from fulfilling its Constitutional duty, there can, as a matter of law, be no *rational basis* for Congress' conduct — "plausible" (or implausible), fictitious or real — and that the petitioner has thus met its "heavy burden of proving Congressional *irrationality*".

ARGUMENT

The First Question

As just stated, the Court of Appeals decision is believed to be in conflict with the prior decisions of the Supreme Court, (see petitioner's footnote 3 herein), cited by the government to support the doctrine that any "plausible reasons for Congress' action" will support the constitutional "rationality" of Congress' conduct.

As petitioner understands these cases, however, they all require *two* conditions, not just *one*: —

> (1) first, that there must be a "conceivable basis which might support it . . . regardless of 'whether the conceived reason * * * actually motivated the legislature" (S.B. 9);

and

---

3. *FCC v Beach Commnc'ns, Inc.*, 508 U.S. 307, 315 (1993); *Lehnhausen Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973); *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980).

(2) secondly, that Congress, despite its conduct, has still retained the ability to perform and does perform its Constitutional "legitimate objectives" (S.B. 8).

The solicitor and petitioner appear to agree that this *Figueroa* case may involve satisfying the first condition (a "conceivable" basis).

The second condition, however, is utterly lacking in the present case. As earlier stated, nowhere does the solicitor deny the factual situation set forth by the petition and which the solicitor characterizes (S.B. 8, 9) as before quoted — "underfunding of the PTO that has harmed the patent system by creating delays of 10 years or more in the processing of patent applications".

The Second Question — The New Direct "Maintenance" Taxes

The solicitor, like the courts below, has made it sound as if petitioner is questioning the well-recognized constitutional right of Congress to "prescribe the conditions upon which individuals may obtain patents" (S.B. 9) or establishing a "patent fee structure . . . reasonably designed to fund the overall patent system; which includes not only the PTO's annual operating expenses, but also its employee benefits program, executive oversight of the PTO, and the federal court system that administers patent disputes" (S.B. 7).

Nothing, however, could be further from petitioner's position.

The problem is, however, that, as stated by Judge Newman (App. A, 28a)

> The Court of Federal Claims lumped all of the PTO collections together, and held that they are not a tax.

Those lumped together "PTO collections", indeed, when subjected to Judge Newman's "more rigorous analysis", include very different things:

(1) the historical and appropriate patent fees Judge Newman described as "allocated to support PTO services (and that) are not an unapportioned tax" (App. A, 28a), and that have funded and continue to "fund" the overall patent system for over 200 years of our history;

and now, recently,

(2) a whole *new* set of taxes supported, as Judge Newman characterizes it (App. A 28a) by "the broad powers of Congress to tax" — and not before known or levied in this country— and further totally *unrelated* to supporting the administration of the PTO to grant patents [*not* at all, in practice, "to support PTO services" (App. 28a)].

This new set of taxes levied in years 3 ½, 7 ½ and 11 ½ after patent grant, in Judge Newman's words (App. A 27a, 28a) has

> increased income from maintenance fees [wherein] *the PTO came to be viewed as a kind of 'profit center'* for the support of *unrelated* government projects.

It is this new so-called "maintenance" charge (tax) and its usage for purposes unrelated to Article I, Section 8, particularly with the PTO in crisis, that underlies petitioner's assertion that this is in fact a direct tax and abuse of Constitutional power.

Petitioner asserts that this new practice of so-called "maintenance" taxation and its administration — actually used for other governmental purposes, though supposedly raised under color of the Patent Clause, and under the guise of the word "maintenance" — is actually an improper direct tax on innovation. The fact is, that after the PTO has already granted the patent right, has already charged the inventor fully for the processing of the patent, and, in practice, does nothing further — provides no additional services whatsoever for so-called "maintenance" — it collects additional new taxes from inventors in years 3 ½, 7 ½ and 11 ½ after the patent grant. Congress has not even used these new tax monies to aid the patent system operations or crisis, but rather has diverted them for "the support of unrelated government services", though they were supposedly raised under the banner of Article I Section 8.

As to this issue, accordingly, petitioner urges that Judge Newman is correct that, contrary of the solicitor's argument that these "patent fees do not constitute a tax at all" (S.B. 9), these new so-called "maintenance" fees, in actual practice, having nothing whatever to do with "operating the patent system". They are rather a bold new tax, "diverted to support other government activity and can readily be viewed as an unapportioned direct tax" on the ownership of already granted patent property — prohibited by *Article I, Section 9, clause 4 (App. A, 28a).*

These are not in any way related to the historic "conditions of obtaining" a patent, or "to defray the cost of administering and operating the patent system", within Congress' province. They are for nothing — no services — just for new revenue — and are in fact used, indeed, for unrelated government purposes. This is thus believed to be an unconstitutional direct tax on innovation.

CONCLUSION

Petitioner accordingly urges the granting of this writ of certiorari.

Respectfully submitted,

ROBERT H. RINES
Counsel of Record
RINES & RINES
24 Warren Street
Concord, NH 03301
(603) 228-0121

HEATH W. HOGLUND
HOGLUND & PAMIAS, P.S.C.
256 Eleanor Roosevelt Street
San Juan, Puerto Rico 06918
(787) 772-9200

Counsel for Petitioner